

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1586

APPLICATION OF SEA-LAND CORPORATION
ON BEHALF OF SEA-LAND SERVICE, INC.
AND NORTH EUROPE - U.S. ATLANTIC
CONFERENCE FOR THE BENEFIT OF THERMOS

ORDER

This matter is before the Commission on its own motion and upon Exceptions submitted by Sea-Land Service Corporation ("Sea-Land") to an Initial Decision ("I.D.") of Administrative Law Judge Charles E. Morgan ("Presiding Officer") denying a Sea-Land application to waive collection of freight charges.

BACKGROUND

Pursuant to the procedures of section 8(e) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1707(e), and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92, Sea-Land filed an application for the benefit of Thermos to waive \$1,914.00 in freight charges on two shipments of vacuum insulated carafes and refills from West Germany to Boston, Massachusetts.¹ Sea-

¹ The North Europe - U.S. Atlantic Conference ("NEAC" or "Conference") joined in Sea-Land's application. Sea-Land was a member of NEAC for all periods relevant to this proceeding.

Land states that at a meeting of the Conference the membership agreed to a lump-sum, per container rate for the carriage of the subject commodities, but that due to an oversight by Conference staff, the publication instructions were misplaced and the agreed-to rate was not timely published. Upon learning of the error, NEAC corrected its tariff, but by that time two of Thermos' shipments had moved. Lacking the agreed-to tariff rate, these shipments were rated at an applicable service contract rate because that rate was lower than the existing tariff rate. The difference between these two rates is the amount that Sea-Land seeks to waive.

In his Initial Decision served on January 26, 1988, the Presiding Officer denied Sea-Land's application and directed it to collect unpaid freight charges. The Presiding Officer viewed Sea-Land's application as a request to modify the terms of the service contract in effect at the time of shipment. He noted, however, that the Commission recently held that the section 8(e) procedures do not apply to service contract errors. Special Docket No. 1513, Application of Evergreen International (U.S.A.) Corp. for the Benefit of Service Contract Shipper, served January 12, 1988. He concluded that Sea-Land's application must, therefore, be denied, " . . . because it seeks permission to waive collection of a portion of the freight charges, partially in a service contract." The Presiding Officer further concluded that denial of the application was

appropriate because the Commission's service contract regulations do not permit changing the essential terms of a service contract during its term.

In its Exceptions filed subsequent to the Commission's notice of intent to review the I.D., Sea-Land specifically claims that, as a matter of law, the Presiding Officer erred when he: (1) found that the application related to a proposed modification of a service contract rate; and (2) failed to consider a waiver on the basis of an inadvertent omission concerning a tariff rate. Sea-Land explains that NEAC had entered into a service contract with Thermos ("S.C. No. 439") which related to transportation of vacuum insulated carafes and refills in the subject trade. Sea-Land further advises that Thermos had met its minimum volume requirement under S.C. No. 439 prior to the negotiations between Sea-Land and Thermos for the per container rate in the NEAC tariff.²

Sea-Land contends that since Thermos met its volume commitment, it was no longer bound by the contract's terms. It argues that the rate subsequently agreed to between it and Thermos was a revision not of the service contract rate, but rather of a previously higher tariff rate. Sea-Land also contends that, had the error not been made, the

² Sea-Land submits further that Thermos was always free to ship under tariff rates during the course of the service contract, with only the risk that it might not meet its minimum commitment as a result and be subject to liquidated damages.

applicable rate would have been either the service contract rate or the tariff rate, whichever the shipper chose to use.

Sea-Land notes the Presiding Officer's reliance on Evergreen, but contends that since the application does not relate to a change in service contract rates, the decision is inapposite. Sea-Land also finds the Presiding Officer's reference to the Commission's regulations prohibiting modification of a service contract's essential terms to be irrelevant, since no service contract modification was involved.

DISCUSSION

In Evergreen, supra, the Commission recently established the principle that the waiver/refund provisions of section 8(e) of the 1984 Act cannot be used to correct alleged errors in service contracts.³ The Presiding Officer in this proceeding has correctly enunciated this basic principle. However, the facts presented here are not similar to those in Evergreen, and the effect of that decision is, therefore, irrelevant to the instant case.

Sea-Land is not seeking to correct an error in a service contract. Although the involved commodities were the subject of a service contract, the shipper's volume

³ Whether, by the terms of a service contract, a carrier or conference can lawfully restrict a shipper signatory from utilizing otherwise applicable tariff rates is an issue that we need not decide in this proceeding since there is no indication of such a restriction in the instant contract.

commitment had been met under the contract and, in any event, the shipper was free to ship under tariff rates during the term of the contract. Sea-Land is seeking to correct an error in failing to file an agreed-to rate in the NEAC tariff. All the other requirements of section 8(e) and 46 C.F.R. § 502.92 have been met, and Sea-Land is entitled to relief regardless of the existence of the service contract with Thermos.

Moreover, Sea-Land's application is not in any way seeking a prohibited modification of the essential terms of a service contract. While the shipper would be using a different and lower rate than that which appears in an existing service contract, that rate was to be published in the Conference tariff, and the service contract would stand alone, unchanged, and unaffected by the tariff rate.

THEREFORE, IT IS ORDERED, That the Initial Decision served January 26, 1988 in this proceeding is reversed; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. is granted permission to waive collection of freight charges in the amount of \$1,914.00 from Thermos for two shipments of vacuum insulated cargoes and refills from Bremerhaven, West Germany to Boston, Massachusetts; and

IT IS FURTHER ORDERED, That the following notice be published in the North Europe - U.S. Atlantic Conference Tariff No. FMC 11/ICC NEUA 301-A:

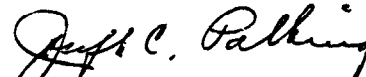
Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1586, that effective March 28, 1987, and continuing through April 7, 1987, the rate on Vacuum Insulated

Carafes and Refills, house to house, from the Continent to U.S. Atlantic ports is \$1850.00 lump sum per 35/40 ft. container. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodity described which may have sailed during the specified period of time.

IT IS FURTHER ORDERED, That applicant shall, within 30 days, waive charges and publish and file with the Commission a tariff notice in the manner required by this decision and, within five days thereafter, furnish the Secretary with evidence of waiver along with a copy of the prescribed tariff notice; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.


Joseph C. Polking
Secretary